Supreme Court, U.S.
FILED
99 674 AUG 16 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

James Weeden, et al.,

Petitioners

Auto Workers Credit Union,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Heather M. Cockley, Esquire
Counsel of Record
13 Park Avenue West, Suite 300
Mansfield, OH 44902
(419) 522-5297

35M

Questions Presented for Review

1. WHETHER THE LOWER COURT ERRED BY FAILING TO CANCEL THE PETITIONER'S MORTGAGE PURSUANT TO THE EXPRESS STATUTORY LANGUAGE WHEN TENDER OF THE MORTGAGE PROCEEDS HAS BEEN MADE, AND THE RESPONDENT FAILED TO ACCEPT THESE PROCEEDS UPON "ADVICE OF COUNSEL."

2. WHETHER THE LOWER COURT ERRED IN STATING THAT THE PETITIONER'S WERE RESPONSIBLE TO REPAY THE RESPONDENTS, "WITH INTEREST", WHEN THE STATUTE HAS NO PROVISION FOR THE PAYMENT OF INTEREST ON A CANCELED OBLIGATION.

3. WHETHER THE LOWER COURT ERRED IN FAILING TO REMAND THIS MATTER FOR A NEW TRIAL DUE TO THE LOWER COURTS ERRONEOUS JURY INSTRUCTIONS.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners, James Weeden, and Tina Weeden, state that they have no parent corporation or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Questions Presented for Review..... i

Rule 29.6 Statement ii

Table of Contents..... iii

Table of Authorities..... iv

Opinions Below.....1

Statement of the Basis of

Jurisdiction.....1

Constitutional, Statutory and Ordinance Provisions

Involved in this Case..... 2

Statement of the Case.....2

Argument 4

I. THE PETITIONER ESTABLISHED THAT THE RESPONDENT VIOLATED THE TRUTH IN LENDING ACT AND THE LOWER COURT FAILED TO PROVIDE THE PETITIONERS WITH THE REQUIRED STATUTORY REMEDIES.....4

A. Advice of Counsel cannot be used as a defense to a violation of the Truth In Lending Act.

B. The Truth In Lending Act has no provisions for the prevailing party to pay interest on a canceled obligation.

C. The District Court improperly instructed the Jury and as such, the Petitioners are entitled to a new Jury Trial.

Conclusion.....8

Appendix

Exhibit A- Circuit Court Decision.....1a

Exhibit B- Order of the District Court.....14a

Exhibit C- Circuit Court's Order Denying Petition for Rehearing.....19a

TABLE OF AUTHORITIES

Page

Cases:

Brown v National Permanent Federal Sav. And Loan Ass'n, 683 F.2d 444 (C.A.D.C. 1982).....8

Clay v Johnson, 22 F. Supp. 2d 832 (N.D.I.11. 1998)...8

Etta v Seaboard Enterprises, 674 F.2d 913, (C.A.D.C. 1982).....8

Eveland v Star Bank, 976 F. Supp. 721 (S.D. Ohio 1997).....8

Kocsis v. Pierce, 192 Mich. App. 92, 98; 480 NW2d 598 (1991).....8

Rudisell v. Fifth Third Bank, 622 F.2nd 243, (1980) ..7,8

Sosa v. Fite, 498 F.2d 114 (1974) 6

Williams v Homestake Mortg. Co, 968 F.2d 1137 (C.A.11 (Fla.) 1992.....8

Miscellaneous Statutes:

12 C.F.R. Section 226.23 (a) 4,6

12 C.F.R. Section 226.23 (b).....4,6

12 C.F.R. Section 226.23 (d).....4

Official Staff Commentary to Regulation Z

15 U.S.C. Section 1601 2

15 U.S.C. Section 1635 (a) 6

15 U.S.C. Section 1635 (b) 6

15 U.S.C. Section 1640 (c) 6

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth District is set forth in the Appendix, Page 1a, and is unreported but dated March 19, 1999. The Order of the United States District Court, Northern District of Ohio, Eastern Division is set forth in the Appendix, Page 14a, and is dated November 27, 1996. A timely Petition for Rehearing was filed and denied on May 18, 1999 and set forth in the Appendix, Page 19a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit issued its denial for James Weeden, et al., for rehearing on May 18, 1999. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

15 U.S.C. Section 1601 (1980)

15 U.S.C. Section 1635 (a)

15 U.S.C. Section 1635 (b)

12 C.F.R. Section 226.23 (a)

12 C.F.R. Section 226.23 (b)

12 C.F.R. Section 226.23 (d)

Official Staff Commentary to Regulation Z

STATEMENT OF THE CASE

The Petitioner states that this important issue must be heard because of the substantial change in the Lower Courts position regarding the Truth In Lending Act, at 15 U.S.C. Section 1601 et seq., and the decisions obvious incompatibility with the decisions of other Courts of Appeals when dealing with the same or similar issues.

On or about July 9, 1993 the Petitioners signed a mortgage and note with the Respondents.

On or about July 21, 1993 the Petitioners began canceling this mortgage and note in writing. The

Respondents refused to honor the Petitioners notices of cancellation when received and continue to refuse to honor those notices even today.

On or about October 1, 1993 the Auto Worker's Credit Union sued the Petitioners/Appellants in Richland County, Ohio to require them to sign legal documents for the loan which had already been rescinded. (Case No. 93-566H).

On February 18, 1994 the Petitioners filed the within action to force the Respondents to comply with the Truth In Lending Act.

On November 27, 1996 a Judgment Entry was entered in the Northern District of Ohio, Eastern Division which was unfavorable to the Petitioners.

A timely appeal was perfected to the Sixth District Court of Appeals.

The United States Court of Appeals for the Sixth District issued a decision on March 19, 1999 granting Judgment to the Petitioners but improperly limiting the amount of that Judgment.

A Petition for Rehearing was timely filed in the Sixth District Court of Appeals but was denied on May 18, 1999.

This Petition follows.

ARGUMENT

I. THE PETITIONER ESTABLISHED THAT THE RESPONDENT VIOLATED THE TRUTH IN LENDING ACT AND THE LOWER COURT FAILED TO PROVIDE THE PETITIONERS WITH THE REQUIRED STATUTORY REMEDIES.

The Lower Court found that the Respondents violated the Truth In Lending Act by failing to provide the Petitioners with the required notices of cancellation and that the Petitioners canceled the within transaction in an acceptable manner, (12 C.F.R. Section 226.23 (a)(b)).

Pursuant to the Truth In Lending Statute, upon cancellation of the lending documents, the Respondents was required to return to the Petitioners all funds paid to them to date and the Respondents failed and continue to fail to comply with these requirements, (12 C.F.R. Section 226.23 (d)).

Since July of 1993 the Petitioners have canceled or attempted to rescind this transaction on fifty to seventy separate occasions. Each of those rescissions or cancellations has been met by the same negative attitude by the Auto Worker's Credit Union and not one

of those documents has been honored.

After failing to honor in excess of fifty Notices of Rescission, which were properly presented to them, the Defendants/Appellees continued to argue that somehow the Petitioners/Appellants in this case are unreasonable and/or unsympathetic are not entitled to the full statutory remedies provided by the law.

The Defendants/Appellees continue to argue this even though they failed to accept the Petitioners/Appellants tender of the funds borrowed which is also acknowledged in the Court's Judgment Entry upon "advice of counsel".

If the advice of their counsel was not correct, the Auto Worker's Credit Union has a cause of action against that attorney, which does not include these Petitioners/ Appellants.

The Petitioners/Appellants were not required to tender back any funds prior to the Defendants/Appellees' canceling the mortgage and note herein, but did indeed attempt to tender these funds. Therefore, by contract and the act, the Petitioners/Appellants' obligation to the Defendants/Appellees has been null and void since 1993. 15 USC 1635(b) and Sosa v. Fite, C.A. Tex

1974, 498 F2d 114.

The Respondents have stated several reasons they should not be required to comply with the Truth In Lending Act. These reasons are prohibited under the Act.

A. Advice of Counsel cannot be used as a defense to a violation of the Truth In Lending Act.

The Truth In Lending Act provides for a bonafide error defense. However, erroneous advice of counsel is one of the exceptions listed under the bonafide error defense and cannot be used herein, 15 U. S. C. Section 1640(c).

B. The Truth In Lending Act has no provisions for the prevailing party to pay interest on a canceled obligation.

The clear language of the statute must be construed in favor of the borrower.

Cancellation of consumer contracts is provided for at 15 U.S.C. Section 1635(a) (b) and 12 C.F.R. Section 226.23 (a) (b). These cancellation provisions must be followed exactly pursuant to the Statute. The Respondents herein have ignored the cancellation demands of the Petitioners even to the extent of scheduling a meeting to allow the Petitioners to refinance the obligation herein.

The Petitioners provided the Respondents with notice and offered to tender the amounts due on their loan at a specified date and time. This Tender, pursuant to the Statute, relieved the Petitioners of their obligation under the Note and Mortgage herein.

Further, the Truth In Lending Statute has no provision for the payment of interest to the Lender/Respondent prior to the expiration of the recission period. The Lower Court properly held that the Petitioners rescinded this transaction in a timely fashion but improperly stated that ". . . the Weedens return to the Credit Union of the original proceeds of the mortgage, with interest." Emphasis added. This statement is contrary to the prior decisions of the Sixth Circuit see Rudisell v Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980),

In Rudisell, the Sixth Circuit held that the borrower owed the lender for the fair value of the siding received not the cost of the siding.

There was no statement that the Rudisell's owed any interest on the value of the siding, much less on the full amount of the loan.

The Court's decision herein, requiring interest to be paid is absolutely in conflict with the Rudisell decision, see also the decisions in Eveland v Star

Bank, 976 F. Supp. 721 (S.D. Ohio 1997), Brown v National Permanent Federal Sav. And Loan Ass'n, 683 F.2d 444 (C.A.D.C. 1982), Kocsis v Pierce,480 N.W. 2d 598 (Mich. App. 1991), Clay v Johnson, 22 F. Supp. 2d 832 (N.D.I.11. 1998), Williams v Homestake Mortg. Co, 968 F.2d 1137 (C.A.11 (Fla.) 1992, Sosa v. Fite, 498 F2d 114 (C.A. Tex 1974), and Etta v Seaboard Enterprises, 674 F.2d 913, (C.A.D.C. 1982).

C. The District Court improperly instructed the Jury and as such, the Petitioners are entitled to a new Jury Trial.

The Court below held that the Jury Instructions were erroneous and cannot be considered harmless and as such this cause should have been remanded for a new Jury Trial on the issue of Petitioners damages.

CONCLUSION

The Truth In Lending Act was passed to place borrowers and lenders on similar footing. Prior to this Act, lenders had no responsibility to borrowers to truthfully disclose lending rates, payment terms, or finance charges. Since this Act has been in effect, borrowers have had the ability to compare rates and terms of lending documents among financial institutions.

The Lower Court and the Sixth Circuit Court of

Appeals ignored both the intent and the scope of the Truth In Lending Act by refusing to apply the clear provisions of that Law to the Facts underlying Petitioners claims and instead improperly modified the terms of this Act in direct violation of it's statutory language.

The Court should grant certiorari to review this important issue involving consumer lending transactions; or modify the Sixth Circuit Order to cancel the Petitioners note and mortgage and return all moneys paid, or remand this matter to the District Court for a new Trial.

Respectfully submitted,

Heather M. Cockley
13 Park Avenue West, Suite 300
Mansfield, Ohio 44902
(419) 522-5297

EXHIBIT A
NOT RECOMMENDED FOR PUBLICATION

No.97-3073

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES WEEDEN and TINA WEEDEN,
Plaintiffs-Appellants,

vs

AUTO WORKERS CREDIT UNION, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO

BEFORE:KEITH, SUHRHEINRICH, and DAUGHTREY,
Circuit Judges.

PER CURIAM. The plaintiffs, James and Tina Weeden, appeal the district court's denial of both their motion for summary judgment, under Fed. R. Civ. P.56, and their renewed motion for judgment as a matter of law and alternative request for a new trial, under Fed. R. Civ. P.50. Specifically, the Weedens claim that they were entitled to judgment in their favor because the defendant, Auto Workers Credit Union, failed to provide them with the proper number of copies of the Notice of

(TILA), and because accurate material disclosures had not been made on the Truth-in-Lending statements that were provided to them. The Weedens also contend that the district court improperly instructed the jurors that if they found that the Weedens were aware of their right to cancel, they could not find a violation of the truth-in-lending law merely because the Weedens were not provided with more than one copy of their right to cancel. We conclude that judgment for the plaintiffs was appropriate, for failure to provide sufficient copies of the required notice of the right to cancel, and that the jury instruction to the contrary was legally erroneous.

PROCEDURAL AND FACTUAL BACKGROUND

In February 1993, the Weedens submitted a loan application to the Auto Workers Credit Union to refinance the principal mortgage on their home, in order to take advantage of falling interest rates. Shortly after the Weedens submitted the application, the Credit Union provided them with a "good faith estimate of closing costs."' The estimate was based on an interest rate of 7.75 percent, two points below their original mortgage, and did not list a loan origination fee. The Credit Union encountered difficulty in processing the Weedens' application through Member Mortgage Company (to be underwritten by the Credit Union National Association, or CUNA), because James

Weeden was unemployed at the time the Weedens applied for the loan and because there were problems with the amount of acreage of the Weedens' property.

In April 1993, the Weedens resubmitted a loan application to the Credit Union, which then switched lenders and began working to process the loan directly with CUNA. Through CUNA, the Weedens were able to get an even more favorable interest rate of 7.5 percent, with a $450 loan origination fee. Rebecca Long, loan officer at the Credit Union, testified that on May 23,1993, the Weedens were given a second estimate of closing costs, which listed the 7.5 percent interest rate and the $450 fee. The loan was scheduled to close on June 11, 1993, with a title agency chosen by the Weedens.

At trial, Tina Weeden testified that neither she nor her husband had ever received the estimate of closing costs with the 7.5 percent interest rate and the loan origination fee and did not learn about the origination fee or the new interest rate until they arrived at Midland Title Company on June 11. At that point, the Weedens vociferously protested that they had not agreed to pay such a fee and left Midland Title to speak with Wes Volz, the manager of Auto Workers Credit Union, who agreed -- after extended and apparently heated discussion - to remove the fee.

After meeting with Volz, the Weedens returned to Midland Title to complete the closing. They crossed out the $450 origination fee on the TILA statement and

initialed the change. According to the defendant, the removal of the $450 from the loan changed all the figures listed in the TILA statement because it resulted in a very slight modification of the interest to be paid. By the time this discrepancy arose, however, it was too late in the afternoon to secure a recalculated statement from the Credit Union. The closing agent at Midland Title, Sally Dennison, testified that she explained to the Weedens that by signing the compliance agreement, they were agreeing to assist the Auto Workers Credit Union, the lender, in getting the slightly incorrect documents corrected at a later time. Dennison said that she was confident that, upon leaving Midland Title, the Weedens understood that they might have to re-execute another TILA statement.

The deed was filed and the loan checks were disbursed on June 17,1993. The Weedens received an amended TILA statement and a second notice of the right to cancel from the Credit Union in mid-July. (There is some dispute about the date of this Notice of Right to Cancel. The defendants insist that they dated and sent it on July 9, indicating on the form that the three-day right of rescission would expire on July 15. The plaintiffs claim that they did not receive it until July 19, thereby extending the deadline to July22.) The Weedens did not sign the revised TILA statement because, according to Tina Weeden, the figures on the statement were still inaccurate and, perhaps more significantly, because interest rates had dropped by another full point since the closing. She testified that rather than sign the TILA statement, she chose to exercise her right to cancel the

loan.

According to her testimony, Tina Weeden went to the Credit Union office on July 21, 1993, and handed a teller an envelope containing the executed right-to-cancel form. The Credit Union insists that it has no record of the Weedens' attempt to cancel or rescind the loan, noting that Tina Weeden is the only person who has a copy of the signed notice that she allegedly delivered to the bank.

On August 17,1993, purportedly unaware of the Weedens' desire to rescind, the Credit Union's attorney wrote to the Weedens requesting again that they sign the TILA statement, pointing out that the mortgage could not otherwise be finalized. The letter referred the Weedens to the compliance agreement which they signed on June 11 and notified them that without their signatures on the modified TILA statement, the loan could not be sold on the secondary market. The Weedens did not respond to this letter.

In the meantime, the Credit Union had started billing the Weedens for loan payments on a monthly basis. Tina Weeden testified that after the first couple of months, she began writing "right to cancel" on "numerous" monthly payments and, in December 1993, also sent the defendant a telegram claiming exercise of her right to rescind. In April,1994, the Weedens received approval from another mortgage company for a loan at 7 percent interest, to be held open for 30 days pending release of the Credit Union mortgage on the

property. The Weedens sent the Credit Union a letter to the attention of Wes Volz, Manager, demanding a meeting with Volz. It was signed by both Weedens and stated:

> At this meeting you are to be prepared with a properly executed release of mortgage as is
>
> required by Federal Law to reflect the termination of the security interest being held in the Weeden home.
>
> You are also to be prepared to pay all funds owed the Weeden's [sic] under Federal statute. Including but not limited to all interest and finance charge paid to date, and likewise you are to except [sic] all payments owed to Auto Workers Credit Union and its assigns.
>
> The sole purpose of this meeting is for the Auto Workers Credit Union to provide the Weeden's [sic] a clear and marketable title on their home as is required by law.

Mr. Volz testified that, on the advice of counsel, he did not schedule a meeting with the Weedens as requested in their letter.

The Weedens then filed this lawsuit in February 1994 and moved for summary judgment on the basis of the defendant's failure to recognize Tina Weeden's rescission of the mortgage transaction. In their

summary judgment motion, the Weedens also argued that defendants violated the Truth-in-Lending Act by not giving them each the proper number of the Notice of Right to Cancel and by failing to give them a TILA statement containing accurate material disclosures. Based on the latter fact, they argued, their right to rescind the mortgage transaction should be preserved until July19, 1996, three years from the date of this transaction. The district court denied the motion by marginal entry order, and the case went to trial.

The jury entered a unanimous decision in favor of Auto Workers Credit Union, and the district judge entered judgment based on the jury's verdict. The Weedens moved for judgment as a matter of law and, in the alternative, for a new trial, which the district court also denied by marginal entry order. The plaintiffs now appeal.

ANALYSIS

The denial of a motion for summary judgment is not reviewable where the moving party subsequently loses on the trial of the merits. See Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir.1990). However, the denial of a renewal of that motion pursuant to Rule 50, Fed. R. Civ. P., may be appealed.

The primary thrust of the plaintiffs' legal challenge revolves around the issue of whether they had properly rescinded the mortgage transaction. The general rule is that a residential mortgage transaction or

the refinance of a residential mortgage transaction is not rescindable. However, the Weedens fit into an exception to this rule that allows rescission of a refinance of a residential mortgage by a creditor other than the original creditor. Regulation Z §226.23(f); Commentary to §226.23(f). Rescindable transactions may be rescinded at any time up to midnight of the third business day following the later of: (1) consummation of the transaction, (2) delivery of the notice informing the consumer of the right to rescind, or (3) delivery of all material disclosures. Regulation Z §226.23(a). Although the Credit Union's revised TILA statement and notice of right to cancel indicated that the three-day deadline was July 15, 1993, Tina Weeden contended that she did not receive the notice of her right to cancel until July 19, which would extend the deadline beyond the date of July 21, when she purportedly served notice of cancellation. To back up this contention, she submitted an envelope from the Credit Union -- in which she said the revised TILA statement was received - postmarked July 15.

As it turns out, we need not resolve this dispute because we conclude that judgment should have been granted in favor of the plaintiffs on a different and more certain basis, i.e., that the Credit Union failed to give the

Weedens the proper number of notices of the right to rescind.[1] This failure to deliver the notices extends the rescission period for three years from the date of the transaction.

The Truth-in-Lending Act establishes a right of rescission for any loan transaction in which the borrowers principal dwelling is used as security. 15 U.S.C. §1635(a). The rescission period extends until consummation [of the loan], delivery of the notice [of "midnight of the third business day following right to rescind], or delivery of all material disclosures, whichever occurs last." 12 C.F.R. §226.23(a)(3). Under TILA regulations, a creditor is required to "deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind." 12 C.F.R. §226.23(b)(1). "If the required notice or material disclosures are not delivered, the right to rescind shall expire three years after consummation. 12 C.F.R. §226.23(a)(3).

Although we have not previously addressed the specific issue in this case, we have joined other federal courts of appeals in holding that the Truth-in-Lending Act must be liberally construed in favor of the borrower

---

[1] James Weeden never received a Notice of Right to Cancel, although he should have received two for the first loan application and two for the second. Tina Weeden received only two of the four notices to which she was entitled-one on June 11, 1993, and the other on July 15, 1993.

in order to effectuate the purpose or the statute-- to avoid the uninformed use of credit. See, e.g., Purtle v. Eldridge Auto Sales. Inc., 91 F.3d 797,800(6th Cir 1996), cert. denied, 117S. Ct. 2411 (1997);Jackson v. Grant, 890 F.2d 118,120 (9th Cir. 1989); Mars v. Spartanburg Chrysler Plymouth. Inc., 713 F.2d 65, 67(4th Cir, 1983). Even technical or minor violations of the Act impose liability on the lender. See Jackson, 890 F.2d at 120.

Having conceded that it failed to provide the requisite number of rescission notices, the Credit Union attempts to defend itself on two grounds. First, the defendant insists that because Tina Weeden has a real estate license and actually knew during all relevant times how to rescind the transaction even without the official notices, principles of equity should prevent her and her husband from using the technical mandates of the Truth-in-Lending Act to void the entire transaction. Unfortunately for the credit union, the notice required by the Act is statutory, and equitable defenses are not recognized under the statute. However sympathetic we might be to the defendant's plight, in light of the circumstances surrounding the plaintiffs' actual knowledge, we do not have discretion to ignore the clear language of the law. Furthermore, the purpose of statutory recovery in the Truth-in-Lending Act is "to encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the Act." Watkins v. Simmons and Clark. Inc., 618 F.2d 389,399 (6th Cir. 1980). If we were now to create an exception for debtors who have actual knowledge of

their rights, we would likely undermine the purpose of the Act.

In its second response, the Credit Union urges us to consider the Congressional debates behind a 1995 amendment to the Truth-in-Lending Act in which Congress declared a temporary moratorium on courts' certification of class action suits based on certain kinds of alleged deficiencies in the form of notice. See 15 U.S.C. §1620(i) . In these debates, legislators expressed their wish to eliminate situations in which "small violations of the disclosure requirements of the Truth-in-Lending Act triggered the right of rescission provided by the Act." 141 Cong. Rec. No. 153 S14567 (September 28,1995); see also 141 Cong. Rec. H9513, H9514 (daily ed. Sept. 27,1995) (statement of Rep. Leach) ("The problem is that an honest mistake of no consequence to any of the parties involved has become the subject of shark instincts of the plaintiff's bar.")

We conclude, however, that the Credit Union's reliance on this amendment and its legislative history is flawed. First, the amendment was passed two years after the transaction giving rise to this lawsuit. Second, even if we were to consider the amendment applicable, it would not eliminate either the creditors obligation to provide each borrower with two notices of the right to cancel or the three-year extension of the right to rescind upon failure to provide these notices. At most, the discussion surrounding passage of the amendment indicates that Congress wishes to have courts move away from what it considers in hindsight to be a

"hypertechnical" reading of the Truth-in-Lending Act. See Smith v. Highland Bank, 108 F.3d 1325, 1327 n.4 (11th Cir. 1997). We can only conclude that the scope and effect of congressional intent in this area remain to be seen.

Nevertheless, from our foregoing analysis one thing is clear, and that is that the district judge erred in instructing the jury that they could not find a violation of the law if the plaintiffs were aware of their right to cancel, regardless of the number of notices that the plaintiffs may or may not have received from the defendant. Because of a closing document, entered as an exhibit at trial, that bore both James and Tina Weeden's signature below a statement indicating that they had been made aware of their right to cancel, the instruction clearly doomed any opportunity that the plaintiffs had to succeed in securing a favorable verdict that would force rescission of the loan. While TILA provides for this form of equitable relief, as we have previously noted, it does not permit the raising of equitable defenses, even in cases with "unsympathetic facts." Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704 (9th Cir. 1986). It follows that there was no legal basis for this particular instruction, and it cannot be considered harmless.

CONCLUSION

Despite the error in the jury charge, however, we conclude that a retrial in this case is unnecessary because, at oral argument before this court, all parties appeared to agree that rescission of the loan and restoration to their original positions would constitute a fair resolution of their dispute. We therefore VACATE the judgment of the district court and enter judgment in favor of the plaintiffs. Further, we REMAND to the district court with instructions to order rescission of the loan; the defendant's return to the Weedens of all funds paid in, with interest: and the Weedens' return to the Credit Union of the original proceeds of the mortgage, with interest. Because rescission is the relief the Weedens have consistently sought -- according to them ever since July 1993 - we decline to order the payment of statutory damages in this case. Cf. Stone v. Mehlberg, 728 F.Supp. 1341, 1349-50 (W.D. Mich. 1989). However, because the plaintiffs are the prevailing parties in this action, the district court must also assess attorneys' fees and costs in their favor.

EXHIBIT B

UNITED STATES COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES F. WEEDEN, et at,
CASE NOS. 1:94 CV 365
5:95 CV 1067
Plaintiff
vs
AUTO WORKERS CREDIT UNION, at al
Defendant

JUDGE DONALD C. NUGENT

JUDGMENT

The above captioned case came before this Court for a trial by jury. At the conclusion of the trial, the Jury returned a unanimous verdict in favor of Defendant Auto Workers Credit Union and against Plaintiffs James and Tina Weeden on their First Amended Complaint.

In their First Amended Complaint in Case No.1:94 CV 365, James and Tina Weeden made eight separate allegations against Auto Workers Credit Union, Mr. Wesley Volz, and Ms. Rebecca Long. Plaintiffs' James and Tina Weeden's eight claims were as follows:

Count One: A claim for a violation of the Truth in Lending Act.

Count Two: A claim for Malicious Prosecution.

Count Three: A claim for Intentional Infliction of Emotional Distress.

Count Four: A claim for Deceptive Trade Practices.

Count Five: A claim for Fair Debt Collection Practices.

Count Six: A claim for Slander of Title.

Count Seven: A claim for Breach of Contract.

Count Eight: A claim for Breach of Duty.

In their Joint Answer, Defendants specifically denied all violations and claims made them.

In their Complaint in Case No.5:95 CV 1067, James and Tina Weeden claim the Credit Union National Association (hereinafter "CUNA") Mortgage Corporation, violated the Truth Lending Act and the Fair Debt Collection Act.

In its Answer, CUNA Mortgage specifically denied all violations and claims made against them.

The trial commenced on November 15, 1996. On this date the Jury was duly empaneled and sworn. The Jury consisted of eight jurors. Opening statements

of counsel were made. Plaintiffs called the following witnesses: Ms. Rebecca Long and Mr. Wesley Voiz. The Court was adjourned until November 18, 1996 at 8:00 a.m.

The trial continued on November 18, 1996. The Plaintiffs called the following witnesses, Ms. Tina Weeden and Mr. James Weeden. The Court was adjourned until November 19, 1996 at 8.00 a.m.

The trial continued on November 19, 1996. The Plaintiffs called their next witness Mr. David Hardy. At the conclusion of Mr. Hardy's testimony, the Plaintiffs rested both of their cases. Defendants moved the Court for Judgment as a Matter of Law, pursuant to Fed.R. Civ.P. 50(A)(1). At that time, the Court withheld a ruling on Defendants Motion.

Thereafter, Defendants began with their case-in-chief. Defendants called the following witnesses in order: Ms. Rebecca Long, Mr. Wesley Volz, Mr. David Hardy, and Ms. Sally A. Dennison. At the conclusion of Ms. Dennison's testimony, the Defendants rested their case.

Plaintiffs called as a rebuttal witness Mr. Harshbarger. Defendants renewed their Motion for Judgment as a Matter of Law, pursuant to Fed.R.Civ.P. 50(A)(1). Defendants Motion pursuant to Fed.R. Civ.P. 50(A)(1) was GRANTED in Case No.1:94 CV 365 as to Counts Two through Eight and as to Ms. Rebecca Long and Mr. Wesley Volz entirely. In Case No.5:95 CV

1067, Defendants' Motion was GRANTED with all costs to the Plaintiff. The Court was adjourned until November20, 1996 at 8:00AM.

The trial continued on November 20, 1996. Final arguments of counsel were made. The Court instructed the Jury on the law pursuant to Fed.R.Civ P. 51, and the Jury retired in deliberation. The Jury returned a unanimous verdict in favor of Defendants on the Plaintiffs' First Amended Complaint. The Jury, in open Court, returned the following unanimous Interrogatory Answer and General Verdict pursuant to Fed.F.Civ.P. 48 and 49.

JURY INTERROGATORY

1) Did any of the truth in lending disclosure statements contain an inaccurate material disclosure? NO

(Insert in ink either "yes" or "no")

2) Did the Plaintiffs ever receive the required number of notice of "right to cancel" forms at any time? YES

(Insert in ink either "yes" or "no")

3) Were there material disclosures in the Truth in Lending Statements which were delivered to the Plaintiffs? NO

(Insert in ink either "yes" or "no")

4) Did the Plaintiffs rescind the Auto Workers' Credit Union mortgage loan in a timely fashion? NO

(Insert in ink either "yes" or "no")

GENERAL VERDICT

We the Jury, being duly empaneled and sworn find in favor of Defendant, Auto Workers' Credit Union and against the Plaintiff, James and Tina Weeden, on Plaintiff Complaint.

The Court read the Interrogatory and General Verdict in open court. Thereafter, the Court polled the Jury as to the Interrogatory Answer and the General Verdict. Each Juror affirmatively responded to the correctness of the Interrogatory Answer and General Verdict.

THEREFORE, the Court enters Judgment pursuant to Fed.R.Civ.P. 58 for Defendant Auto Workers Credit Union.

IT IS SO ORDERED.

/S/
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

DATED: November 27, 1996

EXHIBIT C
97-3073
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES F. WEEDEN; TINA WEEDEN,
Plaintiffs-Appellants,

V.

AUTO WORKERS CREDIT UNION, ET AL.,
Defendants-Appellees.

ORDER

BEFORE:KEITH, SUHRHEINRICH, and DAUGHTREY,
Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/ May 18, 1999

Leonard Green, Clerk